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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATE OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	3:73-cv-00127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **RESPONSE OF WALKER RIVER IRRIGATION DISTRICT IN OPPOSITION TO MOTION TO DISQUALIFY GORDON DePAOLI**

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I. THE MOTION TO DISQUALIFY.

Joseph and Beverly Landolt (the "Landolts") have moved the Court for an order disqualifying Gordon DePaoli from further representation of any party in this matter (the "Disqualification Motion"), including the Walker River Irrigation District (the "District") and other individuals on whose behalf Mr. DePaoli has appeared (the "Individual DePaoli Clients"). The Disqualification Motion also seeks to prohibit all other attorneys in Mr. DePaoli's law firm, Woodburn and Wedge, from any such representation.

The factual basis and legal authority for the Disqualification Motion are less than clear. The only facts supporting it are an affidavit to the effect that various persons have designated Mr. DePaoli and his law firm as their attorney in Notices of Appearances and Intent to Participate, and the fact that DePaoli has acted as counsel to the District in this matter and in the Mediation. The only rule of ethics referenced is Nevada Supreme Court Rule 157.

The conclusions that the Court is expected to draw from these facts and that Rule are even less clear. However, the argument seems to be along the following lines:

1. The rights to water held by the District and by the Individual DePaoli Clients will be determined in this action. *See*, *Disqualification Motion*, p. 3, lns. 15-16.

2. The interests of the Individual DePaoli Clients and the interests of the District in this litigation conflict. Id., p. 3, lns. 16-17; lns. 22-24; p. 7, lns. 6-18.

3. DePaoli has or will receive in the Mediation information vital to the defense of the Individual DePaoli Clients, but which cannot be used by them because of DePaoli's obligations to the District by reason of the *Mediation Process Agreement*. Id., p. 3, ln. 15 - p. 4, ln. 14.

4. DePaoli has a duty to disclose to the Individual DePaoli Clients the progress of and solutions proposed in the Mediation, and cannot meet that duty. Id., p. 8, lns. 4-10.

5. The Disqualification Motion hypothesizes that DePaoli will use information obtained in the Mediation to protect the water rights of the Individual DePaoli Clients, to the prejudice and disadvantage of the Landolts and others not represented by him. Id., p. 8, lns. 11-25.

6. The only remedy for all of this is disqualification from representation of anyone because it is impossible to obtain the consents contemplated by Nevada Supreme Court Rule 157. Id., p. 9, lns. 1-12.

On its face, the Disqualification Motion demonstrates a lack of understanding of the matters to be litigated here, and of the sequence in which that litigation will proceed. With respect to the Mediation, the Disqualification Motion distorts the roles of both the District and its counsel in that process, and ignores the relevant provisions of the *Mediation Process Agreement* and the *Order Governing Mediation Process*. Finally, to a large extent, it is based upon mere speculation.

The Disqualification Motion has no basis in fact or in law, and the Landolts have no standing to bring it. *See*, pp. 19-22, infra. More importantly, however, there is no basis in fact for asserting, at this stage of this litigation, that DePaoli's representation of the Individual DePaoli Clients is or will be directly adverse to his representation of the District, and vice-versa. The District and the Individual DePaoli Clients are defendants, and their water rights are already adjudicated by the Walker River Decree or recognized under state law. Those rights will not be redetermined here. *See*, pgs. 13-16; 23-27, infra. There is also no basis in fact for contending now that DePaoli's representation of the District is or may materially limit his representation of the Individual DePaoli Clients, and vice-versa. They share the common goal to ensure that the Tribe and United States do not acquire any more water rights. *See*, pgs. 27-30, infra. Finally, in either case, if it appears that such a conflict may arise in the future, there is no basis in fact for concluding that the District and Individual DePaoli Clients could not provide informed consent to

such representation at an appropriate time. The manner in which this Court has provided for the management of this case provides ideal opportunities to make informed assessments about the issues in the case, and to make the informed judgments required to be addressed by the provisions of Nevada Supreme Court Rule 157. *See*, pgs. 8-13, 30-32.

II. STATEMENT OF FACTS.

A. The Claims of the United States and Tribe.

In this litigation, the Walker River Paiute Tribe (the "Tribe") and the United States seek recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for 167,460 acres of land included in the Reservation in 1936. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. These claims are made against both surface and underground water.

The United States also makes additional claims to surface water and underground water in the Walker River Basin for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps, and the Bureau of Land Management. It also advances claims for surface and underground water for the Yerington Reservation, the Bridgeport Paiute Indian Colony, and several individual Indian allotments.

Neither the United States nor the Tribe seeks to readjudicate the water rights recognized by the Walker River Decree.

B. The Court's Management of the Claims of the United States and Tribe - the Case Management Order.

1. Introduction.

After extensive briefing, on April 19, 2000, the Court entered the Case Management Order ("CMO"). *See*, Subfile C-125-B, Docket No. 108. In the CMO, the Court recognized that the case as a whole is simply too big and too complex to process on a reasonable basis without bifurcation and other management. It, therefore, entered an order to manage the case, and that management is directly relevant to the issues raised in the Disqualification Motion.

The CMO bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). Except as expressly provided in the CMO, all discovery and other proceedings in the action are stayed. *CMO*, p.4, lns. 20-24. The CMO requires the Tribe and United States to serve their amended pleadings and related service documents on and thereby join numerous individuals and entities who hold surface and underground water rights within the Walker River Basin. It groups these individuals and entities into nine different categories. *CMO*, pp. 5-6.

2. Requests for Waivers of Personal Service.

The details with respect to service of process were left to the Magistrate Judge. *See*, *e.g.*, CMO at 6-8. Consistent with the CMO, the active parties in Subfile No. C-125-B, through briefing, argument and agreement and with the assistance of the Magistrate Judge, have addressed many of those details. *See*, *e.g.*, Subfile C-125-C, Docket No. 580; Subfile C-125-B, Docket No. 206; 207. The details of that service have involved the United States and Tribe seeking waivers of personal service from water right holders within the District and within the Basin as a whole. Water right holders who waive personal service are also required to file and serve a Notice of Appearance and Intent to Participate in the litigation. *CMO*, pg. 12, lns. 17-22. They may identify an attorney in that Notice of Appearance.

The United States and Tribe began seeking waivers of personal service in the summer of 2004. *Affidavit of Gordon H. DePaoli in Support of Response of Walker River Irrigation District in Opposition to Motion to Disqualify Gordon DePaoli* (the "*DePaoli Affidavit*"), para. 10. In order to inform water right holders within the District about the waiver of service process, the District, through its counsel, held workshops in Yerington and Smith Valley. Those workshops provided background information on the claims being made, how the claims might affect one's water rights, the CMO, and the waiver of service process. Id., paras. 10-11.

The workshops also provided information on the Notice of Appearance and Intent to Participate. They also covered the Disclaimer of Interest forms and the Notice of Change in Ownership forms. *DePaoli Affidavit*, para. 10. The District and its counsel volunteered to assist with the requirements of completing, filing and serving those forms for District constituents, and continues with that assistance at the present time. Id., para. 12.

DePaoli and his law firm have agreed to be identified and have been identified as counsel for many District water right holders in Notices of Appearance and Intent to Participate. *DePaoli Affidavit*, para. 13. That was done for three important reasons. First, there was no doubt that completion of service of process would take several years, and that after service is complete, it will be necessary to inform the defendants of how and when the case would proceed. Id., para. 14. Indeed, the CMO recognized the burdens associated with this lapse of time and the number of parties in the action. *See*, *CMO*, p. 8, lns. 19-26. Some of those burdens, at least initially, are reduced when service on numerous defendants can be made by service on an attorney. Id.

Second, as is considered in greater detail below, representation of the District in this matter is not directly adverse to representation of individual water right holders within the District, and vice-versa. Similarly, the responsibilities of a lawyer representing the District in

this matter do not materially limit his representation of individual water right holders within the District, and vice-versa. *DePaoli Affidavit*, paras. 17-18. Third, the manner in which the Court has phased this case presents opportunities for informed consideration of these questions at an appropriate time.

3. Phased Proceedings for the Tribal Claims.

The CMO expressly provides that no answers or other pleading will be required except upon further order of the Magistrate Judge. It also provides that no default shall be taken for failure to appear. *CMO*, p. 12, lns. 22-25. The United States and the Tribe have commenced phased service as required by the CMO. That service is not yet complete.

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I will consist of "threshold issues as identified and determined by the Magistrate Judge." Phase II will "involve completion and determination on the merits of all matters relating to [the] Tribal Claims." *CMO*, pg. 11, lns. 11-18. Additional phases of the proceedings will "encompass all remaining issues in the case." *Id.*, p. 11, lns. 25-26.

The identification of threshold issues is left to the Magistrate Judge, and those issues shall "not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." *CMO*, p. 9. Included among the possible threshold issues to be considered for inclusion by the Magistrate Judge are issues related to the Court's jurisdiction and equitable defenses to the Tribal Claims. *See*, *CMO*, pgs. 9-11.

The CMO also directs the procedures to be followed in connection with the disposition of the threshold issues. First, it allows for discovery on those issues. Second, it allows for written discovery concerning the basis for the Tribal Claims. It stays all other discovery. *CMO*, p. 13, lns. 4-15. It provides for disposition of the threshold issues by motion, evidentiary hearing, or both. *Id.*, p. 13, ln. 16 - p. 14, ln. 2.

The management of this case as provided in the CMO is directly relevant to the issues raised by the Disqualification Motion. First, at the present time, except for issues related to service of process, all proceedings are stayed until service is complete, and service is not complete. Second, the issues to be litigated and decided in the threshold phase (Phase I) of the Tribal Claims will not be finally known until all parties are joined. Third, the scope of what will be litigated, if anything, with respect to the merits of the Tribal Claims, will not be known until the threshold issues are finally decided.

It is clear that through the threshold issues, the Court seeks answers to two broad questions which will determine the scope of the merits (Phase II) of the Tribal Claims. The first is whether there are equitable defenses which bar some or all of the Tribal Claims. Depending on how that question is answered, the merits (Phase II) of the Tribal Claims may not proceed at all. Alternatively, some, but not all, or all, of those claims will proceed on the merits.

The second question relates to the extent to which the Court may, or should, become involved in issues related to underground water and its uses within the Walker River Basin. The potential outcomes there range from not at all, to in a limited way, to a separate adjudication of rights to underground water, and, finally, to an adjudication of surface and underground water as a single source of supply. Again, depending on how those questions are answered, the scope of the merits (Phase II) of the Tribal Claims may be broad or narrow.

Finally, the CMO recognizes that defenses to the Tribal Claims may be the same or similar to defenses to the Federal Claims. *CMO*, p. 2, lns. 17-24. Thus, it is possible, if not likely, that the scope of the litigation of the Federal Claims may narrow as a result of determinations of related threshold issues.

C. The Interests of the District and the Individual DePaoli Clients With Respect to the Claims of the Tribe and the United States.

1. The Water Rights Held by the District.

The District was formed on April 14, 1919, pursuant to Nevada's Irrigation District Act, which was enacted that year. The District is governed by a five-member Board of Directors. Directors are elected at large, but must reside within a division of the District. They are elected to a four-year term. An elector of the District must own a water right. *See*, *e.g.*, N.R.S. §§ 539.045; 539.123; *DePaoli Affidavit*, paras. 5-6.

The District owns and operates, and holds legal title to water rights for Bridgeport Reservoir and Topaz Reservoir. The water rights for those reservoirs are recognized in the *Walker River Decree* and in three water right licenses issued to the District by the State of California. *See*, *Walker River Decree*, pgs. 63A-65; *DePaoli Affidavit*, paras. 5-6.

The District also holds permits to surplus Walker River surface water in Nevada. It holds Permit No. 5528 and Certificate No. 8859 on the West Walker River for 491.2 cubic feet per second not to exceed 89,612 acre feet annually to irrigate described land within the District. The District holds Permit No. 25017 and Certificate No. 8860 on the East Walker River for 349.1 cubic feet per second not to exceed 63,688 acre feet annually to irrigate described land within the District. These water rights are referred to as "State Certificated Rights." The District holds Nevada Permit No. 25813 for 9.01 cfs of groundwater not to exceed 3269.63 acre feet per season for use on specific lands within the District. Finally, the District also holds Permit No. 9405, applied for in 1931 and issued in 1954, to appropriate up to 200,000 acre feet annually to be stored in a new reservoir on the West Walker River, downstream of Topaz Reservoir, commonly referred to as the Hoye Canyon Reservoir. This reservoir has not been built. *DePaoli Affidavit*, paras. 5-6.

Legal title to all of these water rights is held by the District. However, the District is not an irrigator, and the beneficial owners of District held water rights are individual electors within the District, which include the Board of Directors, who have placed, and continue to place, the water under those District held water rights to beneficial use and who, through the apportionment of benefits process, have paid District assessments since its formation. *DePaoli Affidavit*, paras. 5-6.

2. Water Rights of Individual DePaoli Clients.

The Individual DePaoli Clients who have listed Mr. DePaoli as attorney on their *Notices of Appearance and Intent to Participate* are all electors within the District. Rather than describing the water rights held by each one separately, it is perhaps easiest to describe the water right categories within the District, because the water rights of the Individual DePaoli Clients are representative of those categories.

The surface water rights for lands within the boundaries of the District consist of four categories and individual electors within the District, including members of its Board and the Individual DePaoli Clients, may and do hold a combination of water rights from these categories. As noted, the District constructed, operates and maintains Bridgeport and Topaz Reservoirs in order to conserve some of the surplus waters of the Walker River.[1] Those reservoirs are not large enough to store all of the surplus waters of the Walker River. As a result, lands within the boundaries of the District do not have a single priority, common water right as do lands in many other irrigation districts. *DePaoli Affidavit*, paras. 5-7.

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[1] The Disqualification Motion labels the District as "exclusively a storage organization," as though, if it were true, it would somehow make the District the enemy of the persons whose interests it serves. *See*, *Disqualification Motion*, pg. 7, lns. 7-8. In fact, the District stores water from the natural flow of the two forks of the Walker River with a priority recognized by the Decree and California law. It stores that water and makes it available to its beneficial owners, the electors in the District. Moreover, the District holds rights to natural flow which is not stored and to underground water.

Lands within the boundaries of the District retained their water right for the direct diversion of water from the natural flow of the Walker River as recognized in the *Walker River Decree*. These water rights are owned directly by individual farmers, and are referred to herein as "Natural Flow Rights." *See*, *Walker River Decree* at pgs. 18-70.

Nevada's Irrigation District Act required the directors of the District to examine each tract or legal subdivision of land within the District, and to determine the benefits which would accrue to each tract or subdivision from the construction or purchase of irrigation works. The cost of those works was to be apportioned or distributed over the tracts or subdivisions of land in proportion to the benefits. The amounts so apportioned became and remain the basis for fixing annual assessments levied against the tracts of land. *See*, N.R.S. §§ 539.560 et. seq.

As a part of that apportionment of benefits process, the flows of the Walker River system were analyzed, as were the expected yields of the two Reservoirs. As a result of that process, it was determined that lands with a Natural Flow Right having a priority date of 1873 and earlier would not require any supplemental stored water. Those lands were not, and are not, assessed for the Reservoirs. Lands with a Natural Flow Right having a priority date of 1874 and later were determined to require stored water to supplement those rights. Those lands were allocated a portion of the stored water from the Reservoirs. Such lands have both Natural Flow Rights and also receive supplemental storage water from Bridgeport Reservoir, Topaz Reservoir, or both. *DePaoli Affidavit*, paras. 5-7.

Finally, because analysis showed that there would be additional stored water available after all need for supplemental stored water was satisfied, the remaining stored water was allocated to land which at that time had no water right at all. This water right is referred to as a "New Land Water Right." A New Land Water Right provides only 2.0592 acre feet per acre of

stored water per season, which is substantially less than the amount of water required to irrigate an acre of land. Id.

In addition, because the available surface water sometimes does not provide an adequate supply, some, but not all, of the water right holders within the District also hold underground water rights for purposes of supplementing their surface irrigation water supplies. In addition, a small percentage of the underground water rights for irrigation within the District are primary rights, rather than being supplemental to another surface water right.

The District's State Certificated Rights and its underground rights are made available to District electors to assist in providing them an adequate water supply. Finally, because most of the District is not within an area supplied by a municipal water purveyor, most of the District electors and the Individual DePaoli Clients have domestic wells.

D. The Mediation.

In the fall of 2001, the District joined with Nevada, California, the Walker River Paiute Tribe, Mono County, California, Lyon County, Nevada, Mineral County, Nevada, and the Walker Lake Working Group in requesting that the United States, through the Department of Justice and the Department of the Interior, assemble a team to represent the interests of the Untied States in negotiations with them with respect to issues on the Walker River system. While waiting for a response from the United States, those parties interviewed candidates to act as a mediator and, subject to approval by the United States, selected a mediator. In May, 2002, the United States appointed a team to represent its interests.

It is important to understand the role of the District in the Mediation. The District, through its elected Board, recognized that it would be beneficial to explore the potential to resolve, or at least narrow, issues in a case involving hundreds, if not thousands, of parties, and which the Court has correctly described as enormous and complex. Obviously, it is not

possible in a case like this one, to include every party, each with separate representation in a mediation process. If that were a requirement, there could be no mediation. Thus, to pursue alternative dispute resolution here, it was necessary to limit the number of participants in some manner.

The District participates in the Mediation because it is the entity whose electors include most of the individuals and entities whose water rights may be affected, and whose elected directors are among those individuals. It does not participate to simply protect the water rights to which it holds legal title, or the water rights of those electors who happen to constitute its present Board of Directors. It participates for the purpose of protecting the water rights of all of its electors who are the beneficial owners of District held water rights, and who individually own Natural Flow and underground rights. *DePaoli Affidavit*, para. 23.

The *Mediation Process Agreement* was executed by the Mediating Parties in late April and early May, 2003. Section 9.1 of the *Mediation Process Agreement* provided that it could not become effective until the Court entered an order "substantially in accordance with the attached Proposed Order Governing Mediation Process." The Proposed Order had two key purposes. The first was to ensure that the communications in the process would not be admissible or discoverable in the litigation, except as expressly allowed by the *Mediation Process Agreement*. *See, Order Governing Mediation Process* at para. 3, Docket No. 430; *see also*, 28 U.S.C. § 652 (d). The second was to ensure that, except as to issues related to service of process, the litigation would be stayed. *Id.* at para. 2.

On May 9, 2003, the Mediating Parties filed a joint motion requesting that the Court enter the proposed *Order Governing Mediation Process*. On May 27, 2003, the *Order Governing Mediation Process* was entered, as proposed. *See*, C-125-B, Docket No. 430.

The Disqualification Motion misconstrues the confidentiality provisions of both the *Mediation Process Agreement* and the *Order Governing Mediation Process*. First, it asserts that DePaoli is prohibited from disclosing to the Individual DePaoli Clients the progress of and solutions under consideration in the Mediation. Second, the Disqualification Motion assumes that in the litigation, persons represented by DePaoli, the District, and the Individual DePaoli Clients, will have an advantage over other water right holders, and an ability to use in the litigation, information obtained in the Mediation Process. Neither is true.

First, paragraph 8.3.4 of the Mediation Process Agreement allows the District to communicate with its constituents on solutions being considered. Through the District, such information in the past has been, and in the future can be, communicated to the Individual DePaoli Clients, all of whom are constituents of the District. *DePaoli Affidavit*, para. 25.

Second, when it comes to litigation use of information obtained in the Mediation Process, neither the District, nor any other party to the Mediation, has an advantage over those who have not participated in the Mediation Process, regardless of who represents them in the litigation. Paragraph 3 of the *Order Governing Mediation Process* provides:

> The Mediation Process is a confidential process. That process shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence and shall not be discoverable in this or any other case. This Paragraph shall apply notwithstanding any request under Nevada or federal freedom of information statutes, *see, e.g.*, 5 U.S.C. 552. This Mediation Process is a "mediation" within the meaning of California Evidence Code § 1115(a). The Parties to the Mediation Process are bound by and shall comply with the confidentiality provisions set forth in Paragraphs 8 and 9.3 of the Mediation Process Agreement. Except as provided in Paragraph 8.3.1 of the Mediation Process Agreement, all Parties to the Mediation Process shall be protected from being required to disclose any information regarding the substance of the Mediation Process to any party to the C-125 case, whether or not such party is also a Party to the Mediation Process. Except as provided in Paragraph 8.3.1 of the Mediation Process Agreement, all information that is confidential within the Mediation Process and under the Mediation Process Agreement shall not be admissible for any purpose in the C-125 case or in any judicial or administrative proceeding for any purpose, including but not limited to impeachment.

Order Governing Mediation Process, Paragraph 3 (Doc. No. 430) [Emphasis added].

In applicable part, Paragraph 8.3.1 of the *Mediation Process Agreement* states:

> 8.3.1 **Previously Disclosed, Known or Available Information.** The provisions of Paragraph 8.2 notwithstanding, information or evidence previously disclosed or known or available to a Party outside this Mediation Process or that is otherwise admissible or discoverable shall not be rendered confidential, inadmissible or non-discoverable in any pending or subsequent litigation or administrative proceeding or alternate dispute resolution process or anywhere else solely as a result of its use in this Mediation Process.

Clearly, the provisions of paragraph 3 of the *Order Governing Mediation Process* and paragraph 8.3.1 of the *Mediation Process Agreement* place the Mediating Parties and their attorneys and those who were not Mediating Parties and their attorneys on equal footing with respect to obtaining for litigation use information that may have been used in the Mediation Process.

Because DePaoli, while representing the District in the Mediation, has agreed to represent the Individual DePaoli Clients in the litigation, the Disqualification Motion argues that DePaoli now represents those persons in the Mediation, and is violating ethical obligations to those persons. DePaoli's appearance in the litigation for recently served parties has not expanded the identity of the Mediating Parties. The identity of the Mediating Parties has not changed. It is the District which is the Mediating Party, not its counsel. *DePaoli Affidavit*, para. 24.

III. THE LANDOLTS HAVE NO STANDING TO BRING THE DISQUALIFICATION MOTION.

A party must have standing in order to move for disqualification of counsel. Further, while state rules are not entirely irrelevant to the inquiry, issues of standing in federal court must be resolved using federal law. *See*, *Colyer v. Smith*, 50 F.Supp.2d 966, 971 n.2 (C.D. Cal. 1999) (citing *Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983)). The Ninth Circuit has never

directly decided whether non-clients may move for disqualification based upon a conflict of interest. *See*, Id. (expressly leaving the question open; *see also*, *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998) (expressing doubt on a plaintiff's standing to complain about a possible conflict of interest arising out of common representation of defendants in different civil actions). Recently, many courts, including the federal district courts in the Ninth Circuit, have begun using the standing analysis of Article III to determine whether non-clients have standing to move for disqualification. *See*, *Id.* at 968-973.

Article III standing is jurisdictional. Without it, a federal court does not have the power to decide the issue before it. *See*, *e.g.*, *Colyer v. Smith*, 50 F.Supp.2d 966, 968 (C.D. Cal. 1999) (finding disqualification motion based on conflict of interest did not satisfy Article III standing requirements); see also *Concat, LP v. Unilever, PLC*, 350 F.Supp.2d 796, 818 (N.D. Cal. 2004) (finding Article III standing requirements satisfied in third-party disqualification case). "The requirements for Article III standing, necessary for any party to seek relief from a federal court, are that the party have personally suffered from an 'injury in fact,' which is causally related to the conduct in issue and redressable by a favorable decision of the court." Id. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). To establish an injury in fact, the movant must establish "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations and citations omitted); *see also*, *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979) (stating that the injury may be actual or imminent, but must be one that the party has, or may, suffer personally).

There is a split of authority on the question of whether a party who is not a client or former client of the attorney alleged to have the conflict possesses the standing necessary to pursue a motion to disqualify. The majority view is that, generally, only a current or former

client has standing to move for disqualification. See, *Colyer v. Smith*, 50 F.Supp.2d 966, 969 (C.D. Cal. 1999) (citing *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83 (5th Cir. 1976)); see also, *Eikelberger v. Tolotti*, 96 Nev. 525, 530, 611 P.2d 1086, 1090 (1980); *United States v. Walker River Irr. Dist.*, D.Nev. Equity No. C-125, Feb. 13, 1990 Order, p. 8 (Doc. 162). The Landolts are neither. *DePaoli Affidavit*, para. 29.

In *Colyer*, the court reviewed the limited situations in which a non-client may raise an objection to counsel of another party. The *Colyer* court recognized an exception to the general rule where it is shown that the "ethical breach so infects the litigation that it impacts the moving party's interest in a just and lawful determination of her claims." *Colyer*, 50 F.Supp.2d at 971. Assuming arguendo there is an ethical breach here, there is nothing more than speculation that it impacts the Landolts' interest in a just and lawful determination of their defenses to the Tribal Claims and Federal Claims. Landolts speculate that information gained by DePaoli in the Mediation will allow him to protect the water rights of the Individual DePaoli Clients, and at the same time impose the full burden of the Tribal and Federal Claims on the water rights of the Landolts and others not directly involved in the Mediation. That assertion is nonsense.

First, if there are viable equitable defenses, they will apply to all defendants. Second, a favorable decision on the merits of some or all of the Tribal and Federal Claims will require recognition of a water right with a quantity and a priority. Those aspects of the right will apply and affect all other water rights similarly. The Court may not recognize a water right which can be exercised in priority against some, but not all, other water rights.

The *Colyer* court also recognized that in some cases attorneys who are obligated to report ethical violations have a "rulesbased" standing to move to disqualify other attorneys for ethical violations. *Colyer*, 50 F.Supp.2d at 970. However, the *Colyer* court rejected the notion that such a generalized interest establishes sufficient injury in fact to allow an opposing

attorney standing to move to disqualify. Id., at 972. Rather, it is the Landolts who must show a concrete and particularized protected interest which is actually or imminently burdened by the alleged ethical violation. Id. at 973.

Neither Landolts nor their attorneys have demonstrated, or can demonstrate, that any rights of theirs are implicated now or in the future by DePaoli's present concurrent representation of the District and the Individual DePaoli Clients in this matter. The *Disqualification Motion* should be denied based upon their lack of standing.

IV. THERE IS NO BASIS FOR DISQUALIFICATION HERE.

A. Introduction.

One of the trial court's duties and responsibilities is to ensure that the attorneys who appear before it maintain the highest ethical standards and preserve the public's confidence in the judicial system. *See*, *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F.Supp. 724, 729 (E.D. Va. 1990) (collecting cases). Nevertheless, disqualification of a party's chosen counsel is a serious matter that cannot be based on imagined scenarios of conflict. *See*, *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 145 (4th Cir. 1992) ("disqualification of a litigant's chosen counsel for [a conflict of interest] may not be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur"). Assessing whether there is a conflict of interest is primarily the responsibility of the lawyer undertaking the representation. *See*, *ABA Model Rule 1.7, Official Comment 15* (pre-2002).[2] A party seeking disqualification bears a "high standard of proof" to show that that some specifically identifiable impropriety warrants disqualification. *Tessier*, 731 F.Supp. at

[2] The preamble and comments to the ABA Model Rules are not enacted in Nevada, but "may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments." SCR 150 (2).

729; see also, *Willmes v. Reno Mun. Court*, 118 Nev. 831, 836, 59 P.3d 1197, 1200-01 (2002) (first prong of disqualification test is showing at least a "reasonable possibility that some specifically identifiable impropriety did in fact occur"). This high burden is fitting in light of a party's right to freely choose counsel. *Tessier*, 731 F.Supp. at 729.

Nevada has a two-prong test for evaluating attorney disqualification motions. First, the moving party must establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Brown v. Eighth Judicial Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000). This prong necessarily requires an examination of the particular ethical rule(s) relied on by the movant to support disqualification, and of the facts relevant to the rule. Second, the movant "must also establish that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." Id. In this case, the first prong of the test requires an analysis of whether, under SCR 157, DePaoli's representation of the Individual DePaoli Clients is "directly adverse" or "may be materially limited" by his representation of the District to the detriment of the Landolts.[3]

B. Representation of the District in this Matter is Not Directly Adverse to the Individual DePaoli Clients, or Vice-Versa.

In applicable part, paragraph 1 of Nevada Supreme Court Rule 157 provides:

> 1. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

[3] The Landolts rely primarily on *Cronin v. Eighth Judicial Dist. Court*, 105 Nev. 635, 781 P.2d 1150 (1989) and *Brown v. Eighth Judicial District Court*, 116 Nev. 1200, 14 P.3d 1266 (2000). In both cases, the first prong of the test was virtually not in dispute. In *Cronin*, it was undisputed that Cronin had "repeated and pervasive" ex parte communications with management level employees of a party represented by another attorney. *Cronin*, 781 P.2d at 1153. In *Brown*, it was also undisputed that there was a technical violation of Supreme Court Rule 160 (2).

> (a) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (b) each client consents, preferably in writing, after consultation.

[Emphasis added].

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent. Paragraph 1 of Rule 157 expresses that general rule. The Rule addresses conflicts in interests that are directly adverse and concurrently represented. See, *Chapman Engineers v. Natural Gas Sales Co., Inc.*, 766 F.Supp. 949, 954 (D. Ks. 1991). The Rule requires direct adversity and operates only when the interests "will be" directly adverse. Id., 766 F.Supp. at 956. Direct adversity exists when an attorney acts as an advocate for one client against another client. *Jaggers v. Shake*, 37 S.W.3d 737, 740 (Ky. 2001). Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is unrelated. Paragraph 1 applies only when the representation of one client would be directly adverse to the other. The representation of opposing parties in litigation is an example. *ABA Model Rule 1.7, Official Comment (pre-2002).*

There is no representation of interests which are directly adverse here. The District and the Individual DePaoli Clients are all defendants. The Tribal Claims and the Federal Claims seek recognition of additional water rights not recognized in the Walker River Decree, or in any permits issued by Nevada or California. On the other hand, the water rights of the District and the water rights of the Individual DePaoli Clients are already recognized in the Walker River Decree, or by permits issued by Nevada and California. The scope and priority date of those rights will not be redetermined in this litigation.

Thus, although an adjudication of water rights on a stream system requires the joinder of all water users on that system because of the interlocking nature of the rights, the interests of the District and the Individual DePaoli Clients will not be directly adverse because their rights have already been adjudicated and determined. They will share the common goal of first seeking to bar the Tribal Claims (and later the Federal Claims) so that no additional water rights are recognized. Failing that, they will share the common goal of limiting the Tribal Claims (and later the Federal Claims) to as small a quantity of water as possible, with as junior a priority date as possible.

It is only in a situation where the Court undertakes an adjudication of underground water rights, separately or with surface water as a single source of supply, that there may be potential for conflict issues under Supreme Court Rule 157 (1). However, even the concurrent representation of multiple parties in a water rights adjudication is not necessarily improper. *See, ABA Model Rule 1.7, Official Comment 8* ("The propriety of concurrent representation can depend on the nature of the litigation.").

A Colorado ethics opinion addresses the subject in depth and provides a persuasive analysis of how the issue should be considered in the unique context of water law. *See*, Exhibit "A" to *DePaoli Affidavit,* Colorado Ethics Opinion #58 (revised 10/14/1995) (emphasizing the unique nature of water rights litigation). In particular, the Colorado opinion notes that at first blush it might appear that all water rights owners are competing for the same limited resource. However, the particular rights at issue in any given case can vary substantially and in many cases, there is no competition at all. Id. "Thus, it is evident that the outcome of an adjudication proceeding to determine a water right for a present client does not automatically pose a threat to parties who have previously obtained adjudicated rights." Id. Consequently, while it would be improper to represent two parties in competition for the same resource, the disqualification

inquiry must take into consideration whether the adjudication "will alter the historic regime of the stream so as to injure the decreed water rights of others." Id. In essence, the circumstances of each case should control and each case must be examined for actual or potential impairment of the movant's water supply.[4]

Interestingly, complex water rights litigation mirrors aspects of bankruptcy litigation. In the bankruptcy context, Congress has eased the bar to concurrent representations. *See*, 11 U.S.C. § 1103. Court's interpreting this provision have held that concurrent representation of an unsecured creditor's committee and individual unsecured creditors is permissible in the absence of an actual or genuinely possible dispute between the committee and its individual members. *See*, *In re National Liquidators, Inc.*, 182 B.R. 186, 193 (S.D. Ohio 1995); accord, *In re Rusty Jones, Inc.*, 107 B.R. 161, 164 (Bankr. N.D. Ill. 1989) ("A conflict only arises in the event that counsel seeks to represent both individual creditors and a Committee which have adverse interests."). While not directly on point, the bankruptcy cases support the proposition that the peculiarities of water rights litigation demand a strict showing of a likely potential conflict among the multiple parties represented before disqualification is warranted. As the Colorado ethics opinion noted:

> It is unrealistic to require every claimant in a complex water adjudication to have a separate lawyer. In several drainages, the water claimants outnumber all of the licensed lawyers in the state. There are strong cost advantages for clients to seek an attorney with prior water law experience. The costs of educating someone with no water law experience can exceed the economic value of the water right.

See, *Colorado Ethics Opinion #58* (revised 10/14/1995).

[4] The Colorado opinion addresses a situation where an attorney who represents a party with an already recognized or adjudicated water right is also representing one who seeks to have a new right recognized. Here, those parties are the Tribe and the United States, not any client represented by DePaoli.

Thus, while SCR 157 asks whether the clients' interests are "directly adverse" and whether the lawyer's representation "may be materially limited," in most water law situations the operative question should be whether the water supply available to the movant will be impaired as a result of the endeavors of the challenged attorney on behalf of other stakeholders. *See*, *Colorado Ethics Opinion #58* (revised 10/14/1995). Here, DePaoli's efforts on behalf of the District in opposing the Tribal Claims and the Federal Claims will not impair the water supply available to the Individual DePaoli Clients, or vice-versa. However, as is discussed in detail below, because of the manner in which this case will be managed under the CMO, there is no need to speculate now on whether this matter will evolve into an adjudication of underground water or of surface and underground water as a single source of supply, or on which water rights might be directly adverse in such an adjudication. *See*, pgs.30-32, infra.

C. Representation of the District Here Does Not Materially Limit DePaoli's Responsibilities to the Individual DePaoli Clients, or Vice-Versa.

In applicable part, paragraph 2 of Nevada Supreme Court Rule 157 provides:

> 2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
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> (a) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (b) the client consents, preferably in writing, after consultation.
>
> When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[Emphasis added].

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest. The conflict in effect forecloses alternatives that would otherwise be available to

the client. Paragraph 2 of Rule 157 addresses this situation. A possible conflict does not, itself, preclude the representation. The critical questions are the likelihood that a conflict will arise and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. *ABA Model Rule 1.7, Official Comment 4 (pre-2002)*.

The broad questions to be addressed as threshold issues in Phase I of the Tribal Claims do not present a likelihood of conflict on position or strategy between the District and the Individual DePaoli Clients. All will uniformly support defenses which bar the Tribal Claims, and all will also oppose the exercise by the Court of broad jurisdiction over underground water rights and use.[5] The same is true with respect to the Federal Claims.

It is also reasonable to expect that, in most if not all, instances, it is unlikely that there will be a conflict in position or strategy on the merits of the Tribal Claims. It is in the interest of the District and the Individual DePaoli Clients that any additional water rights recognized for the Tribe be as small in quantity and as junior in priority date as possible. The same is true with respect to the Federal Claims.

Again, because of the manner in which this case will proceed under the CMO, it is unnecessary to speculate whether disqualification will be required because of differences in strategy on defenses to, or the merits of, the Tribal Claims. A close and informed look at the relevant issues can take place when the threshold issues are finally defined, and yet again after they are decided, thus defining the scope of the merits of the Tribal Claims. *DePaoli Affidavit*, paras. 18-21.

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[5]Although not directly applicable to the Disqualification Motion, this Court's determination that the District would have been an adequate class representative, at least for Phase I of the Tribal Claims, is at least relevant. There, the Court said "the defendants share a common goal; to ensure that the United States and the Tribe do not acquire any more water rights." *April 29, 2002 Order*, p. 12 (Doc. 179).

Landolts' principal argument appears to be that, through his representation of the District in the Mediation, DePaoli has obtained information crucial to the defense of the Individual DePaoli Clients, and because of his obligations to the District under the *Mediation Process Agreement* and the *Order Governing Mediation Process*, he cannot use that information to carry the day in the litigation. Although DePaoli has obtained no such information (*DePaoli Affidavit* at para. 26), as is clear from the *Mediation Process Agreement* and *Order Governing Mediation Process*, even if he had, the information could not be used by anyone in this litigation unless it is otherwise available, admissible or discoverable. *See*, pgs. 13-14, supra. Therefore, if there is a material limit on DePaoli's responsibilities to the Individual DePaoli Clients here, it does not flow from his representation of the District, but rather from the *Order Governing Mediation Process* which affects him in the same way it affects every other attorney appearing in this case, including the attorneys for the Landolts and the other attorneys who participated in the Mediation.

This Court considered Supreme Court Rule 157 (2) in *Duval Ranching Company v. Glickman*, 930 F.Supp. 469 (D. Nev. 1996). In *Duval*, the Elko County District Attorney, representing Elko County in that litigation, also entered an appearance on behalf of the private plaintiffs in the action. The federal defendants objected to the appearance. 930 F.Supp. at 470-471.

Ultimately, this Court considered the applicability of Supreme Court Rule 157 (2) to that unusual situation. Even though the Court believed there was a "reasonable likelihood that, at some point in the course of this litigation, the needs or desires of the County Commissioners may diverge from those private plaintiffs," and even though if that occurred, the District Attorney had no freedom to choose between the clients, this Court did not preclude his

continued representation of both. 930 F.Supp. at 473. The Court did caution that the District Attorney should exercise great vigilance to ensure continued compliance with the Rule.

The facts here do not present anything close to the same potential for the problems with which the Court was concerned in *Duval*. First, in the threshold issue stage of the Tribal Claims, it is not likely that the needs or desires of the District will diverge from those of the Individual DePaoli Clients, or vice-versa, because the members of the Board of the District are all individual water right holders in the same situation as other water right holders in the District. Second, counsel here is not in the same situation as a District Attorney representing private clients. Third, the phasing and management of this case under the CMO presents timely opportunities for the exercise of vigilance to ensure continued compliance with Rule 157.

D. At Appropriate Times During the Course of This Litigation, Informed Assessments Can be Made and Informed Client Consents Can be Obtained.

The provisions of Rule 157 (1) and (2) clearly provide an opportunity for an attorney to assess the issues in an action, and to make a judgment about whether there will be direct adversity among clients, or whether representation of multiple clients in a single matter will involve a potential for conflicts in responsibilities, and whether such conflicts will adversely affect the representation. In addition, the Rule contemplates that the clients, after consultation about the implications of the common representation and of the advantages and risks involved, may consent to such representation.

Here, the manner in which this Court has phased this case presents opportunities for critical and timely analysis by both the attorney and the clients without the need now for broad prospective consents, based in part on some speculation. At the present time, there is no active litigation, and there will be none until service is complete and the threshold issues are identified. Once the threshold issues are finally identified, the attorney assessment, the client

consultation, and the client consent can be more fully informed. There is no reason to require that process to occur until that time. Indeed, the CMO expressly states as follows:

> Following completion of service of process on the said counterclaims, the Magistrate Judge shall receive recommendations of the parties for procedures for scheduling and for the efficient management of the litigation given the number of parties to the case. Such procedures may include the use of common counsel, special procedures for service of pleadings, or any other mechanisms deemed likely to reduce the burdens on the parties and the court in a case of this magnitude.

CMO, p. 8, lns. 19-26 [Emphasis added]. Thus, in the CMO, the Court has at least suggested an appropriate time to consider issues related to the use of common counsel, presumably including ethical issues.

Moreover, after the threshold issues are decided, the scope of the merits of the Tribal Claims will be known. In addition, the extent to which the Court will become involved in underground water will also be known. This will present another opportunity for a second informed assessment, consultation and consent. *Compare*, *Visa v. First Data Corp.*, 241 F.Supp.2d 1100 (N.D. Cal. 2003) (involving use of a broad prospective waiver letter), with *Zador Corporation, N.V. v. Kwan*, 31 Cal. App. 4th 1285, 27 Cal. Rptr. 2d 754 (1995) (involving initial and successive waivers and consents). Again, there is no reason to require that process to occur before that scope is known. Indeed, the comments to the *Model Rules of Professional Conduct* suggest that the process probably should not occur before that time. *See*, ABA *Model Rule 1.7, Official Comments 18-22 (post-2002)*; cf.also *Matter of Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics*, 102 N.J. 194, 204, 507 A.2d 233, 238 (N.J. 1986) ("joint representation of clients with potentially differing interests is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants"). [Emphasis added).

Finally, until the threshold issues are decided, the litigation will involve matters of defense, i.e., equitable defenses and issues of subject matter jurisdiction. These are not issues which will involve the need to share confidential information learned about one defendant client with other defendant clients. Until that time, the litigation will be directed at issues not involving such information.[6]

V. CONCLUSION.

The ultimate scope of the litigation with respect to Tribal Claims and the Federal Claims is not now known, and will not be known for years. The Disqualification Motion should not be allowed to deprive parties of their attorneys of choice based upon speculation that the litigation will ultimately take place in its broadest possible form.

After the threshold issues are finally identified, DePaoli can, and will, communicate with the District and the Individual DePaoli Clients on positions to be taken on those issues. If one or more clients desire to take a different position which would materially limit the position to be taken on behalf of others, separate or alternative representation can be sought or, alternatively, informed consent can be obtained. The same, of course, will be true with respect to the merits of the Tribal Claims and, ultimately, the Federal Claims when the actual scope of those claims is known. *See*, *DePaoli Affidavit*, paras. 18-21.

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[6] Indeed, unless this litigation evolves into an adjudication of surface and underground water as a single source of supply, it is unlikely that any defendant will have information which cannot be shared with other defendants.

The Disqualification Motion is devoid of merit, and must be denied.

DATED this 30th day of January, 2006. WOODBURN AND WEDGE

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on the 30th day of January, 2006, I electronically filed the foregoing *Response of Walker River Irrigation District in Opposition to Motion to Disqualify Gordon DePaoli* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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